PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTACHMENT.

Priority of Lien, Goods Concealed

A., having actual possession of the goods of his debtor, B., under an unfounded claim of title issued an attachment thereon. Prior to this other creditors of B. had issued an attachment which, however, was subsequently levied, owing to the fact that A., taking advantage of his possession, had put them in the nominal possession of his attorney in a place known only to himself, so as to prevent the levy of attachments by other parties till after he had perfected his own attachment. The United States Supreme Court holds in *Dooley* v. *Hadden*, 21 S. C. Rep. 259, reversing the Circuit Court of Appeals, that A.'s attachment is good and superior to that of the other creditors, notwithstanding the nature of his possession.

BANKRUPTCY.

Bankruptcy Assets, Stock Exchange Seat

The Circuit Court of Appeals (Third Circuit) has just handed down a decision (March 22, 1901; not yet reported), affirming the ruling of the District Court for the Eastern District of Pennsylvania (*In re Page*, 102 Fed. 747, 4 Am. B. R. 467), to the effect that membership in a stock exchange board is an asset which passes to the trustee in bankruptcy. The contention of the bankrupt was that it was a mere personal privilege, and not property, citing *Thompson* v. *Adams*, 93 Pa. 55; *Pancoast* v. *Gowan*, 93 Pa. 66; *Barclay* v. *Smith*, 107 Ill. 349; *Weaver* v. *Fisher*, 110 Ill. 146. The court refused to follow some of the *dicta* in the above cases, and said that while it was not property, in the sense that it was subject to attachment or execution, still such a privilege had some of the incidents of property. The court put the decision on the clause of section 70 of the Bankruptcy Act, which invests the trustee with (5) "property which prior to the filing of the petition he (the bankrupt) could by any means have transferred." The same rule seems to have prevailed under the act of 1867: *In re Gallagher*, 16 Blatch. 410. Under the present act a license to occupy a city market has been held an asset passing to the

BANKRUPTCY (Continued).

trustee: *In re Emrich*, 101 Fed. 231, 4 Am. B. R. 89. The same rule has been applied to liquor licenses: *In re Baker*, 98 Fed. 407, 3 Am. B. R. 412; *In re Brodbine*, 93 Fed. 643, 2 Am. B. R. 53; *In re Fisher*, 98 Fed. 89, 3 Am. B. R. 406.

BANKS.

In *Richardson* v. *Olivier*, 105 Fed. 277, the United States Circuit Court of Appeals (Fifth Circuit) holds that a check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, who may recover the proceeds from the receiver, where they are shown to have come into his possession; and that this rule applies equally whether the depositor is or is not a stockholder, if he had no knowledge of bank's failing condition.

Deposit in Insolvent Bank by Stockholder

BILLS AND NOTES.

The well-known rule that though a party's name appears on a note as joint maker it may be proved by parol that he is merely a surety is extended in the case of *Hoffman* v. *Habighorst*, 63 Pac. 610, to where several parties signed a note as makers, but were, in fact, and to the payee's knowledge, mere sureties for the debt of another. The Supreme Court of Oregon holds that parol evidence of suretyship should not be excluded as tending to vary the terms of a negotiable note, even though the principal debtor's name did not appear on the note, proceeding on the general principle that it is always competent to show that any obligation, whatever its form, was made in fact for the debt of another.

Parol Evidence of Suretyship

CARRIERS.

In *Houston & T. C. R. Co.* v. *McCarty*, 60 S. W. 429, it appeared that a passenger having been injured by the negligence of a railroad company, made a written settlement in full with the company before it was known that he had received severe internal injuries. The Supreme Court of Texas holds the settlement binding and that he could not recover for such additional injury by showing that it was not known by the parties at the time of the settlement, nor included therein. The case of *Lumley* v. *Railway Co.*, 22 C. C. A. 60, in which an apparently different view is taken, is distinguished on the ground that in that case the settlement released liability for certain specified injuries, and added a general release of all demands growing

Injuries to Passenger, Mutual Mistake

CARRIERS (Continued.)
out of the accident, and the court refused to include in this general release injuries unknown at the time and not otherwise specified.

CONSTITUTIONAL LAW.

The status of the islands now under the control of the United States, constituting the great constitutional question at present, has some little light thrown on it by the decision of the Supreme Court in the case of *Neely* v. *Henkel*, 21 S. C. Rep. 302, in which the court affirms the order for the extradition of Neely to Cuba. The ground of the decision is that Cuba is still foreign territory within the extradition act, none the less so, says the court, "because it is under a military governor appointed by and representing the President." "It is true that as between Spain and the United States . . . Cuba . . . was to be treated as conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba." The court relies to some extent upon the declaration in the joint resolution of Congress upon the outbreak of hostilities in 1898, but this recognition of the possibility of territory being under our jurisdiction and yet in some sense foreign, and without the protection of the constitutional amendments as this case holds, materially strengthens the likelihood of the administration being given a free hand in the other islands, and affords a precedent for supporting the ground upon which *Goetze & Co.* v. *U. S.*, 103 Fed. 98, proceeded. Of course Cuba is held under very peculiar conditions, but the case undoubtedly tends toward the view that the restrictions of the Constitution do not extend *ex proprio vigore* to these new islands.

Relations with Cuba

The question of the status of the Hawaiian Islands was raised in the case of *Crossman* v. *U. S.*, 105 Fed. 608, before Judge Townsend, who delivered the opinion of the court in *Goetze & Co.* v. *U. S.*, supra. A distinction was sought to be drawn because this was not a case of territory acquired through treaty with any foreign power, nor a question of military occupation. But the court, in a very brief opinion, upholds the tariff regulations of Congress regarding the sovereignty acquired here, just as plenary as that acquired by treaty or conquest, and adding that the probability of an early decision by the United States Supreme Court makes it his duty to enforce even more than usual the rule as to presuming the constitutionality of an act of Congress.

Hawaiian Islands

CONTRACTS.

Restraint of Marriage

It is well settled that contracts in restraint of marriage are void, but how when such a stipulation is only part of a consideration? Thus in *King* v. *King*, 59 N. E. 111, a contract was made by which A. agreed to live with B. and take care of him, and also not to marry during such service, in consideration that he would provide for her what would be amply sufficient to make her well off. The Supreme Court of Ohio allows a recovery by A. upon the death of B., holding that the void promise was but an incident to the main engagement, which was for labor and care. The court says: "The distinction between a contract merely void and an illegal contract would seem to be an important one." In the former case part of the contract when there is a void stipulation may be upheld, but not so in the latter. This case falls, of course, under the former class.

CORPORATIONS.

Subscribers' Rights, Mistake of Law

The United States Circuit Court (D., Mass.) holds in *Hallett* v. *New England Roller Grate Co.*, 105 Fed. 217, that where the plaintiff had purchased and paid for stock in a corporation of another state, which was issued to him at a price below its par value in violation of the laws of such state, and the certificate was some years afterward declared void by its courts, that his ignorance of the statutes of that state gave him a right to rescind the purchase, as under a mistake of fact, and recover back his money. But such right must be promptly asserted, as he was bound to use reasonable diligence to ascertain his relations to the corporation.

Insolvency, Unpaid Subscriptions, Limitations

On the insolvency of a corporation the creditors' right of action for unpaid subscriptions is complete, so that the statute of limitations then begins to run: *Swearingen* v. *Sewickley Dairy Co.*, 47 Atl 941 (Pa.). "The creditors," says Mr. Justice Mitchell, "need not wait until full administration has exhausted the other assets, but may proceed at once to ascertain and liquidate the stockholders' liability, even though payment may not be enforced until actual necessity has been shown."

CRIMES.

Attempt

The question of where preparation for a crime ends and an attempt begins is difficult of definition, and is best considered in its illustrations. Thus in *Commonwealth* v. *Peaslee*, 59 N. E. 55, a man was indicted for an attempt to burn a

CRIMES (Continued).

building with intent to defraud the insurers. It is held by the Supreme Judicial Court of Massachusetts that an attempt to induce the servant to burn the building was sufficient to warrant a conviction, but not the preparation of combustibles for the same purpose. The court says (Holmes, C. J.): "Some preparations may amount to an attempt. It is a question of degree. . . . The degree of proximity may vary with circumstances, including, among other things, the apprehension which the particular crime is calculated to excite."

DIVORCE.

The tendency of the courts seems to be to limit the scope of cruelty as a cause for divorce to very narrow limits. In

Cruelty

McKay v. *McKay*, 60 S. W. 318, A. had induced B. to marry him by deceitfully asserting that otherwise she would be disgraced, and deserted her two days after the marriage, it being plainly inferrable that such had been his purpose from the beginning. In consequence of this treatment B. became greatly distressed and was ill for a long time. But the Court of Civil Appeals of Texas holds that this is not cruelty entitling her to a divorce, since, it seems, she had recovered, and hence her health was not in danger of being impaired further.

EJECTMENT.

It is usually difficult to decide how far illegality in collateral transactions taints the main issue, and it is not surprising to find the law unsettled in certain phases of this question. One of these, it seems, is where ejectment is brought for certain land, and it appears that a champertous contract exists between the plaintiff and his attorney. Will the court dismiss the action? In *Ellis* v. *Smith*, 37 S. E. 739, the Supreme Court of Georgia holds that it will not, that the champertous contract must be dealt with by itself. It recognizes a divergence of views, but regards the contrary doctrine unsound.

Champertous Contract

GUARDIAN AND WARD.

The Court of Appeals of Kansas holds in *Frazier* v. *Jenkins*, 63 Pac. 459, that a husband of a guardian may not purchase property of the ward. The decision is put on the ground that since the wife's interest in the real estate of her husband, though a contingent interest, is unquestionably property, the husband of the guardian may not purchase, since this would indirectly allow the guardian to purchase, which is, of course, forbidden.

Sale, Right to Purchase

INSURANCE.

Cause of Death, Execution for Crime

An interesting question arises in the case of *Burt* v. *Union Cent. Life Ins. Co.*, 105 Fed. 419, where the Circuit Court of Appeals (Fifth Circuit) holds that an action cannot be maintained on a policy of insurance on the life of a person who was convicted by a court of competent jurisdiction of a capital crime, and was executed pursuant to its sentence, although it is alleged that such decision was erroneous and the deceased in fact innocent. No case in this country, it seems, has previously decided this question, and the court refers to the case of *Society* v. *Bolland*, 4 Bligh (N. R.), 194, 211, as being the only adjudication upon the point. The policy contained no provision for forfeiture in the event of execution for crime, and as to the contention that the insured was innocent the court holds that this would be to make the policy one insuring against the risk of a miscarriage of justice and void as against public policy, and regards the contract of life insurance as not contemplating death under sentence of the law. One judge dissents on the ground that public policy does not prevent the review in a civil court of matters passed on in a criminal court, and cites familiar instances, *e.g.*, an indictment and an action in trespass for the same facts alleged to constitute an assault and battery. So he thinks the plaintiff should have been able to recover if he could convince a jury in a civil court of the insured's innocence.

MANDAMUS.

Bill of Exceptions

Though a mandamus is the proper remedy and will lie to compel a judge to sign a bill of exceptions, it cannot be invoked to compel him to amend a bill of exceptions by incorporating therein certain particular matters, since this would be to compel the exercise, not of a ministerial, but of a judicial duty: *Montana Ore Purchasing Co.* v. *Lindsay*, 63 Pac. 715.

MASTER AND SERVANT.

Limiting Liability for Negligence

In *Peterson* v. *Seattle Traction Co.*, 63 Pac. 539, it appeared that an employe of the traction company had been injured while being taken to his work by the company. At the time of the accident he was riding on a ticket which the company sought to show had been given in consideration of an agreement on his part to assume all risks of accidents, whether "by reason of negligence" of the agents of the traction company or otherwise. The Supreme Court of Washington holds this contract valid

MASTER AND SERVANT—(Continued).

and not against public policy. The court says: "The plaintiff was not bound to enter or remain in the defendant's employ. Both parties were free, the one owing no duty, the other being under no obligation to travel on the defendant's line otherwise than as an ordinary passenger paying fare, and entitled to full redress for injury through negligence"

The desire to include all parties liable, and thus be sure of a verdict, seems in consequence of a little carelessness to have lost a good case in *Doremus* v. *Root*, 63 Pac. 572. A fireman had been injured in a collision, owing to the conductor's failing to obey orders, and he sued the railroad company and conductor jointly. A verdict was rendered against the railroad company, nothing being said about the conductor, and the court entered judgment in favor of the conductor. The Supreme Court of Washington holds that it was error to enter judgment against the railroad, since if the conductor was not negligent the railroad could not be liable, and the judgment in favor of the conductor operated as an estoppel in favor of the railroad. And the court further holds that it was not necessary that the judgment in favor of the conductor be pleaded as a bar to a judgment against the railroad, since the court would judicially notice the orders and judgments entered in the cause before it.

Suit Against Principal and Agent

NAVIGABLE WATERS.

The rule as to slow accretions along navigable streams belonging to the riparian owner is applied under novel and interesting circumstances in the case of *Peuker* v. *Canter*, 63 Pac. 617. In that case the plaintiff had not been originally a riparian owner, but his land was separated from the Missouri River by tracts belonging to the defendant. By the erosion of these latter the river gradually worked its way to plaintiff's tract and he became thus a riparian proprietor. Then the river began to recede, uncovering tracts that originally belonged to the defendant. The Supreme Court of Kansas holds the plaintiff entitled not only to such alluvion as formed within his original lines, but also to an equitable proportion of that formed within the original surveyed lines of the defendant's land and beyond to the river bank, though what this equitable proportion should be it leaves to the lower court.

Alluvion

NEGLIGENCE.

The Supreme Court of New York, Queens County, holds in *Wells* v. *Brooklyn Heights R. Co.*, 68 N. Y. Supp. 305, that

NEGLIGENCE (Continued).

Liability to Licensee

where the plaintiff's intestate was killed by the ordinary negligence of the company while on the track of an elevated railroad, either as a licensee seeking work from a contractor with whom the company had contracted, the company was liable, on the ground that it owed the same affirmative duty of reasonable vigilance and care to a licensee on its tracks as it did to a person there on business. Earlier New York authority to a contrary effect, it is said, is overthrown by later cases. See *De Boer v. Warehouse Co.*, 51 App. Div. 289.

PARTNERSHIP.

In *Perkins* v. *Rouss*, 29 Southern, 92, it appeared that partners had opened an account with the plaintiff and continued purchasing from him for two years, without notifying him that they had subsequently become incorporated or recording their charter. The Supreme Court of Mississippi holds them responsible as partners for the debts of the corporation.

Subsequent Incorporation, Individual Liability

PARENT AND CHILD.

Though the Supreme Court of Rhode Island admits in *Peacock* v. *Linton*, 47 Atl. 887, that an education is a necessity, it refuses to uphold a contract entered into by a minor for tutoring during vacation. The minor son is not his father's agent for that purpose, though he is being educated at his father's expense, says the court. This appears rather an arbitrary distinction, and it seems that the circumstances of each case should rather, as they do in most cases as to necessaries, decide whether the services are "necessary."

Agency, Necessaries

PLEADING.

In *Goodman* v. *Alexander*, 59 N. E. 145, the Court of Appeals of New York holds that in an action to recover against an infant for board furnished her, a complaint need not allege that the father or other person standing *in loco parentis* had refused or was unable to pay for the board furnished, or that there were no persons who could and would support her. This should appear from the other side. One judge dissents on the ground that "it is not enough to simply show that necessaries were furnished, for it must also appear that there was no one whose duty it was to provide for such a one, or, if there was such a person, that he failed to discharge his duty."

Infants, Necessaries

SPECIFIC PERFORMANCE.

The Supreme Court of Illinois holds in *Anderson* v. *Olsen*, 59 N. E. 239, that a vendor of a patent right cannot maintain a suit for specific performance of the contract of sale in order to enforce the payment of an agreed price therefor. The court refuses to apply the doctrine of mutuality and proceeds on the principle that the remedy at law is adequate.

Mutuality, Remedy at Law

REPLEVIN.

The Court of Appeals of New York, discussing briefly the history of this interesting old common-law action, holds in *Sinnott* v. *Feiock*, 59 N. E. 265, that it will not lie against a fraudulent purchaser of goods when they have been taken from him by process which is legal as to him and not by any voluntary act on his part. The action, says the court, is not one for conversion, but in theory to recover possession of chattels. A different holding, it is plainly intimated, would be had in the case of a voluntary alienation.

Fraudulent Purchaser

TRUSTS.

In re Woods, 67 N. Y. Supp. 1123, upholds a gift to the trustees of a cemetery corporation for the purpose of keeping testatrix's family burial lot in order. This case is apparently contrary to the views of the court in *Mussett* v. *Bingle*, Weekly Notes (1876), 170 (Eng. Chan.) with which, it seems, the great majority of cases accord, though its force is weakened by the fact that another part of the decision denied the contestants a share in the residue.

Gift to Corporation in Trust

WILLS.

In *Wynn* v. *Wynn*, 37 S. E. 378, the question was whether the paper presented was a will or a deed. It was in form a warranty deed, and executed as such, but it contained a clause as follows: "To have and to hold the above-described premises to the said A. of the second part, etc., to be his at my death and the death of my wife, B." It is held by the Supreme Court of Georgia that this is not testamentary in character, on the principle that though the tendency of the court in earlier cases had been to construe such papers as testamentary, at present the court inclined to give such a construction as would render the instrument operative.

What Constitutes